E COPY

SEP 18 1958

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 379

EMILY BAUM, ADMINISTRATRIX OF THE ESTATE OF FLOYD BROWN, DECEASED,

Petitioner,

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

JUSTIN WAITKUS,
ANTHONY J. CEFALI,
Attorneys for Petitioner.

SACKETT, PYATT & WAITKUS,
569 Broadway,
Gary, Indiana,
Of Counsel.

THE SUNTHORP-WARREN PRINTING COMPANY, CHICAGO

INDEX.

	PAGE
Opinion of the Court Below	1
Statement of Grounds on Which Jurisdiction of This Court Is Invoked	2
Questions Presented	2
Statutes Involved	4
Statement of the Facts	5
Reasons Relied on for Allowance of the Writ	13
Appendix A, Opinion of Court of Appeals for the Seventh Circuit	i
Appendix B, Order Denying Rehearing	ix
Appendix C, Statute re: Certiorari	x
Appendix D, Pertinent Provisions, Federal Employer's Liability Act	xi
Appendix E, Contributory Negligence	xii
Appendix F, Assumption of Risk	xiii
Appendix G, Statute; Trial Court Jurisdiction	xiv

Authorities Cited.

Cases.

Atlantic Coast Line Co. v. Meeks, 208 S. W. 2d 355, cert. denied 333 U. S. 827 24
Bailey v. Vermont Central R. Co., 319 U. S. 350 18
Blair v. B. & O. R. Co., 323 U. S. 600 ..... 14, 16
Bountiful Brick Co. v. Giles, 276 U. S. 154 25
Casso v. Penn. R. R. Co., 128 F. Supp. 909 21
Casso v. Penn R. R. Co., 219 F. 2d 303 23
Eglsaer v. Scandrett (7th Cir.), 151 F. 2d 562 20
Griswold v. Gardner, 155 F. 2d 333 18
Klepal v. Penn. R. R. Co., 129 F. Supp. 668 (1955) Affirmed in 229 F. 2d 610 28
Lavender v. Kurn, 327 U. S. 645 ..... 4, 14, 15
Lukon v. Penn. R. R. Co. (3rd Cir.), 131 F. 2d 327 31
Mostyn v. Del. L. & W. R. Co., 160 F. 2d 15 24
Rogers v. Missouri P. R. Co., 352 U. S. 500 ..... 3, 14, 18
Schulz v. Penn. R. R. Co., 350 U. S. 523 ..... 3, 4, 14, 17
Stanford v. Penn. R. R. Co. (7th Cir.), 171 F. 2d 632 .. 29
Tennant v. Peoria & Pekin Union R. Co., 321 U. S. 29 ..... 14, 19, 29
U. S. v. Fotopolus (9th Cir.), 180 F. 2d 631 29
Webb v. Ill. Cent. R. R. Co., 352 U. S. 512 14
Wilkerson v. McCarthy, 336 U. S. 53 ..... 14, 16

Other References.

45 U. S. Code, Sec. 51-60 ..... 2, 5
45 U. S. Code, Sec. 51 4

45 U. S. Code, Sec. 53 4
45 U. S. Code, Sec. 54 4
45 U. S. Code, Sec. 56 4
28 U. S. Code, Sec. 1254(1) and 2101(c) 2, 4
7th Amendment, U. S. Constitution 27
25 C. J. S. 1053 29

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. .....

EMILY BAUM, ADMINISTRATRIX OF THE ESTATE OF FLOYD BROWN, DECEASED,
Petitioner.

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner respectfully petitions this Honorable Court to Grant the Writ of Certiorari to review the decision and judgment of the United States Court of Appeals for the Seventh Circuit in the above case. In this behalf, Petitioner shows unto the Court:

JUDGMENT AND OPINION OF THE COURTS BELOW.

The judgment of the United States District Court for the Northern District of Indiana, Hammond Division, was entered October 24, 1957, and is not reported but is printed in the record filed with the clerk of the Court of Appeals below (App. 28).

The opinion of the United States Court of Appeals for the Seventh Circuit, affirming said judgment, was filed June 27, 1958, and is not yet reported but is set forth in the Appendix hereto (App. A).

STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

Date of Judgment to be reviewed, June 27, 1958 (App. A), as amended by order denying rehearing July 29, 1958 (App. B).

Jurisdiction of this Court is invoked under 28 U. S. Code, Sections 1254 (1) and 2101 (C) (App. C).

This action is brought by the Petitioner for the benefit of the surviving widow and two minor children, dependents of the decedent, under and pursuant to the provisions of 45 U. S. Code, Sections 51 to 60 and acts amendatory thereto, known as the Federal Employers Liability Act.

It is claimed that the decision of the District Court under this Federal statute "is not in accordance with applicable decisions of this Court."

QUESTIONS PRESENTED FOR REVIEW.

Question I.

Whether Petitioner was entitled to have the jury consider the Respondent's negligence in failing to provide its employee, Floyd Brown, with a safe place to work and to operate its trains in a careful and prudent manner when the evidence shows (a) negligent failure of supervision of the camp area, (b) a defect or insufficiency to the track road bed and works, (c) a failure to observe and keep a look-out for employees using the track in the camp area.

Question II.

Whether or not Petitioner's decedent was an employee within the scope of his employment within the meaning of the Federal Employers Liability Act, and whether such question should have been submitted to the jury where the evidence shows (a) decedent employee was furnished room and board in bunk cars next to the right of way seven days per week, (b) that in addition to the employee's regular duties, he was subject to call for emergencies classified as "special duties" on any day and any time, (c) that said employee was struck by Respondent's train while near the camp and the bunk cars on a Saturday while he was available for "special duties".

Question III.

Whether the refusal of the trial court (and decision of the Court of Appeals) to allow Petitioner's case to be submitted to the jury constituted an invasion of the province of the jury, contrary to the Seventh Amendment of the Constitution of the United States.

Question IV.

Whether the Court of Appeals in affirming the judgment of the Court below erroneously differed with the opinion of this Supreme Court in the case of *Schulz* v. *Pennsylvania R. R. Co.*, 350 U. S. 523, and *Rogers* v. *Missouri P. R. Co.*, 352 U. S. 500, and other decisions which held that proximate cause need not be established by direct evidence but may be proved by circumstances and which also held that it was for the jury to determine the cause of decedent's fall and entrapment on the track and subsequent death from the reasonable inferences which cannot be said to be speculative.

Question V.

Whether the Court of Appeals in affirming the judgment of the Court below erroneously deviated from the principles established by this Court in the case of *Lavender* v. *Kurn*, 327 U. S. 645, and *Schulz* v. *Pennsylvania R. R. Co.*, 350 U. S. 523, and in failing to grant a retrial and permit the case to go to the jury to settle the dispute by choosing the most reasonable inferences and that this did not involve speculation and conjecture.

STATUTES INVOLVED.

The statutes involved are:

28 U. S. Code, Sec. 1254(1) (Appendix C).
28 U. S. Code, Sec. 2101(c) (Appendix C).
45 U. S. Code, Sec. 51 (Appendix D).
45 U. S. Code, Sec. 53 (Appendix E).
45 U. S. Code, Sec. 54 (Appendix F).
45 U. S. Code, Sec. 56 (Appendix G).

STATEMENT OF THE FACTS.

I.

This action was brought under the Federal Employer's Liability Act, 45 U. S. Code, Sections 51-60, to recover damages for the benefit of the widow and two minor children of the deceased by reason of his death resulting from the negligence of the Baltimore & Ohio R. R. Co.

On September 1, 1953, Floyd Brown, age 32, was hired as a section gang laborer by the defendant, Baltimore & Ohio Railroad Company (App. 12, 14).

For its convenience, the Defendant employer housed forty-four of these laborers in several converted boxcars (Plaintiff's Exhibit 15 and App. 14, 15), which had been placed on a siding next to and north of the railroad right of way of this Defendant, on spurs going into the camp from both directions (App. 13). This camp area, referred to as McCool Camp or Babcock Camp, had been established for over four years and in an area comprised of about ten acres (App. 14 and 15). It was bounded on the east by the nearest crossing which was public highway 149, which crossing was 1700 feet east of the camp, and by McCool Tower on the west which was about 4200 feet west of the camp (App. 17, 20 and 21).

The railroad right of way in front of the camp area was a three level affair as shown by Exhibits (Pl. Exs. 4, 6, 7, 8). The siding nearest the bunkcars was a switch or passing siding. This was on a lower level. The center set of tracks was on a higher level and was known as the westbound main line. The southernmost set of tracks was the east-bound main line and it was on a different level (Pl. Ex. 15, App. 8, 18). At night the area was dark—in fact it had no lights (App. 11). There was a cinder roadway on the north side of the right of way and a pathway or

walk used by the railroad men on the south side of the right of way, next to the east-bound main line. There was no walk-over or cross-over connecting the north or "camp" side of the right of way to the south side of the right of way (App. 13), where the pathway used by the railroad men was located.

No warning signs of any kind were placed in and about the area pertaining to defendant's trains. There were no prohibitive warning signs pertaining to crossing of tracks (App. 15). Defendant admitted that all operating personnel in the area knew of said camp. There was nothing to obstruct the view of the fireman or engineer as they approached the vicinity of defendant's camp where Floyd Brown lived (App. 16). There was a clear view for about two miles each way down the track (App. 21) (Plaintiff's Exhibits 11 and 13).

Ordinarily these section gang laborers worked only eight hours a day, or forty hours per week, but did not regularly work on Saturdays, Sundays or holidays. But, in addition to their regular daily duties, they had other duties which were classified as "special duties". These laborers were advised that they would be called to work in the event of an emergency on the right of way on any day including Saturday, Sunday or holiday, if available. The defendant company further admitted that it was true that Floyd Brown was a member of the section gang who performed work for the defendant in the case of emergencies on the right of way in their district in the event it was necessary to call out the extra gang of which Floyd Brown was a member (App. 14). The Defendant admitted the work Floyd Brown did was in furtherance of interstate commerce (App. 14).

The section gang, of which Floyd Brown was a member, was furnished living quarters and meals by the Defendant

seven (7) days a week (App. 15). Deductions were made from their pay checks for meals (App. 14).

Floyd Brown, along with the rest of the crew, had completed an eight hour day on Friday, September 11, 1953 (App. 17). On the morning of September 12, 1953, at about 4:30 A. M., Floyd Brown requested the cook of the camp, Baker, for some meat scraps to go fishing. The cook saw Floyd Brown walking south to the tracks. At the time Brown appeared to be normal, in good health and sober (App. 19 and 20).

Several hours later, Bond, one of the engineers for the Defendant, said that when his east-bound freight train went by the camp at 7:52 A. M. he saw no one at or near the tracks (App. 21 and 22). He further stated that there was no evidence of any kind that there was any object or body on the tracks near the camp nor did he see any evidence of any accident (App. 21 and 22).

The next east-bound train, operated by engineer Kobiela, passed the camp at 9:06 A. M. This engineer said they took mail from the tower man at McCool and that they either stopped or moved very slowly at this point. He did not see anyone walking near the tracks or at the camp. He stated that if there had been any object or person along the track, he would have seen it as he particularly kept a sharp lookout ahead near this labor camp. He further stated that his fireman made no mention of any accident (App. 22 and 23).

There was no other train on the east-bound main track until 11:42 A. M. This next east-bound train at 11:42 A. M. was operated by engineer Marr. Marr in referring to the accident to Floyd Brown at McCool, Indiana on 9-12-'53 stated that when he was 300 feet or so east of the camp, he saw for the first time an object.

He said this unknown object was about 200 feet ahead

when he first saw it. He stated he did not have any idea what this object was until his train was "right on it". He further stated that the nearest person that he saw at the time was a colored person about 300 feet or so away walking west on the road to the north of the track (App. 24).

Marr said the weather was dry and clear and that he was hauling some 82 loads at a speed of about 50 miles per hour.

This train did not stop after the accident (App. 18) but continued on and made a report of the accident to a tower operator at Alida by throwing a message from the train (App. 19).

All of the engineers' statements refer to this fatal accident as "Accident to Floyd Brown at McCool, Indiana. Date 9-12-'53."

Litchfield, the section foreman, said he was called about noon that day by the McCool operator and told there was "a man in the track". When he got to the scene he found Floyd Brown's body completely cut up and stated that there were parts of the body between the rails of the east main tracks for about 200 feet (App. 20 and 21).

Baker, the camp cook, said that close to noon on that date he first learned that Floyd Brown had been "fatally injured". He stated that Litchfield, the section foreman, had told him about the accident (App. 19), and that the body was found near the camp.

After the accident at 11:42 A. M. and *before* the coroner arrived at 1:20 P. M., several other trains passed over the scene of the accident (App. 17 and 18). None of these other trains stopped or reported the accident (App. 18 and 19).

Elmer T. Johnson of Chesterton, Indiana, the Porter County Coroner, stated in his capacity as coroner he is

called out on homicides, accidental deaths, etc. He said that on September 12, 1953, about 1:20 P. M. he had received a call that there had been *a man found hit by a train on the B. & O.* and that the man was lying on the B. & O. track west of Highway 149 and they wanted a coroner. The Coroner was familiar with the camp that was on the B. & O. right of way. The Coroner arrived some two hours later and found the body very mutilated and dismembered with blood along the tracks and on the south tracks. Clothing was strewn up and down the tracks. One of the decedent's shoes was picked up on the scene and the other was almost at the scene (Emphasis added) (App. 9).

On a burned out tie as shown by Plaintiff's Exhibit 2, the Coroner stated that in something of this sort of burned out tie, there was a shoe wedged in underneath one of these tie plates. He stated that trees were on the south side of the tracks, in referring to Plaintiff's Exhibit 3 and also stated he could not say that this photograph showed the identical burned out tie and plate where the shoe was wedged under the plate but that there was a shoe wedged in under one of these plates between the rails. He was referring to a similar burned out tie since he could not tell whether Plaintiff's Exhibit 2 showed the identical tie because the photograph did not show enough of the track and the camera was on top of the tie (App. 9 and 10).

The Coroner said that the shoe was wedged underneath one of the tie plates that was sticking out and was underneath the rail and tie. He further said that the three sets of tracks and the grades shown were substantially the same as of the time he was there in 1953. The Coroner further stated that Plaintiff's Exhibit 4 looking east on the right of way shows the tracks to be substantially in the same condition as they were when he was there in September, 1953. He also said that Plaintiff's Exhibits 11 and 8 were

a true and correct representation of the right of way as they appeared in September of 1953 and that they were substantially the same as they were in 1953 (App. 10). Plaintiff's Exhibits 1, 2, 3, 4, 5, 8, 9, 10, 11 and 12 show a defective, splintered and burned out east main track in the camp area.

The body was identified as that of Floyd Brown. The Defendant objected to introduction of the death certificate of Floyd Brown but in lieu thereof admitted that if Floyd Brown were alive at the time he was struck by the train, it would indicate that that would be the cause of his death (App. 17).

At the time the Coroner arrived, there was blood on the track and on the rails and there was dry blood on the tie and rails and shreds of clothing strewn along the track not where the body exactly lay. The body had been thrown off in between the two main lines. Along the track where the body had been rolled there were garments, parts of garments, parts of his viscera and parts of a leg or foot (App. 11).

After the pieces had been picked up, they were taken to Mr. Johnson's funeral home. Mr. Johnson took care of the burial on September 15, 1953. Among the personal effects, he found a wallet which had no money in it, and a letter to Floyd Brown from his wife, Lucinda Brown, dated April 7, 1953, from Rockmart, Georgia (App. 12).

Defendant furnished Plaintiff with Exhibits 15, 16 and 17, which photographs were taken September 14, 1953 and were introduced into evidence by the Plaintiff. The Coroner in looking at Plaintiff's Exhibit 15 indicated by a cross where Floyd Brown's body was found. This exhibit also showed the type of box car used by the Defendant and also shows its proximity to the right of way. In Plaintiff's Exhibit 16, the Coroner indicated by an "X" where the

main torso of the body was found and indicated by a circle where one of the shoes was wedged (App. 12 and 13).

No eye witnesses were found by him, nor was there any train waiting when he arrived; nor had any train stopped (App. 13).

On cross-examination, the Coroner testified that parts of the body were found over an area of approximately 75 feet along the right of way. Some parts were south of the tracks and some between the tracks referring to the two rails of the south track. He admitted that it was obvious that this body had been run over or struck by a train. He also testified that the railroad men used a path or a walk alongside the south side of the track but that there was no crosswalk crossing the tracks from the north to the pathway used by the railroad men on the south side of the tracks. The Coroner also said that the spurs go into the camp from both ways and that the box cars are on that spur (App. 13) (Plaintiff's Exhibit 15).

Jack H. Simmons, a commercial photographer for sixteen years, took thirteen photographs as shown by Plaintiff's Exhibits 1 to 13, inclusive, of the Baltimore & Ohio right of way in Porter County between Methodist and Highway 149. Simmons indicated that Plaintiff's Exhibit 1 showed a burned out tie 300 to 350 feet east of the camp. Plaintiff's Exhibit 3 shows the burned out tie is in the inside of the southernmost rail and also shows a mushroom growing underneath the tie plate of the burned out tie as indicated by a white spot on the photograph.

All photographs taken by Simmons were admitted into evidence. These photographs showed views of the burned out tie, grade levels of the tracks, and the right of way. He estimated that the burned out tie shown in Plaintiff's Exhibits was from 200 to 350 feet east of the camp (App. 7 and 8).

The Defendant admitted that Floyd Brown's rate of pay was $1.535 per hour for a forty hour week (App. 14).

Defendant, in answer to interrogatories, said that Floyd Brown's body was approximately 300 to 400 feet east of the camp. The Defendant admitted that the extra gang foreman, C. L. Calvert of Tyner, Indiana, gave instructions or orders to the decedent, Floyd Brown, prior to his death. The Defendant admitted that no employee of the Defendant saw Floyd Brown just prior to his death. They further admitted that all operating personnel in the area knew of said camp as being established at the point where Floyd Brown was killed. They further admitted that nothing obstructed the view of any fireman or engineer as they approached the vicinity of the camp where Floyd Brown lived (App. 15 and 16). The Defendant company admitted that none of the operating trainmen were given any instructions as they passed the camp to slow down, to blow a whistle, to shine bright lights, to ring a bell, to keep a lookout, or to give any signal (App. 17). Defendant admits that only one train crew reported seeing Floyd Brown's body on Defendant's right of way and that was Harry Marr, engineer of train No. 92 at 11:42 A. M. (App. 16, 18 and 19).

Letters of administration were issued to Emily Baum as Administratrix of the Estate of Floyd Brown (App. 19). The Defendant paid for all the burial expenses of Floyd Brown (App. 16).

At the conclusion of the Petitioner's case, Respondent moved for a direction of verdict in favor of the Defendant which the Court granted (App. 27 and 28).

On appeal to the Circuit Court of Appeals for the Seventh Circuit, the judgment was affirmed (App. A).

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

I.

(1) The Trial Court and the Court of Appeals by Their Decision and Judgment in This Cause, Denied Petitioner a Right Specially Set Up and Claimed by Her Under the Federal Employers' Liability Act, Namely, the Right to Have Her Case Submitted to the Jury on the Theory That Petitioner's Decedent, While Employed by Respondent in Interstate Commerce, Was Fatally Injured as a Result of the Negligence of the Respondent in Failing to Use Ordinary Care to Furnish Petitioner's Decedent a Reasonably Safe Place in Which to Work and Failure to Keep a Lookout for Petitioner's Decedent While Using the Facilities Furnished by the Respondent.

The judgment of the district court, if permitted to stand, will deprive this Petitioner of the right of a trial by jury, a basic feature of our system of jurisprudence. District courts and appellate courts will be encouraged to disregard the clear and repeated pronouncements of this Court to the effect that the trial court must submit the issue of negligence to a jury whenever the facts establishing negligence are in dispute or the evidence is such that fair minded men may draw different inferences therefrom. Under such circumstances, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion, and it is immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable.

In recent years this Court has, on many occasions, expressed itself clearly regarding the function of the jury in cases arising under the Federal Employers' Liability Act.

These decisions include:

Lavender v. *Kurn*, 327 U. S. 645.
Wilkerson v. *McCarthy*, 336 U. S. 53.
Blair v. *Baltimore & Ohio R. R. Co.*, 323 U. S. 600.
Schulz v. *Pennsylvania R. R. Co.*, 350 U. S. 523.
Tennant v. *Peoria & P. U. Ry. Co.*, 321 U. S. 29.
Rogers v. *Missouri P. R. Co.*, 352 U. S. 500.
Webb v. *Illinois Cent. R. R. Co.*, 352 U. S. 512.

The decision herein complained of is in direct conflict with the foregoing cases for the reason that the district court and the Court of Appeals, by weighing the evidence, searching the record for conflicting circumstantial evidence and drawing inferences unfavorable to the Petitioner, have violated the clear mandate of this Court and have deprived Petitioner of her right of trial by jury.

The district court and the court of appeals arbitrarily state that there is no evidence of any negligence and completely ignore and dismiss the probative evidence:

(1) That there was a defect in the track and roadbed as shown by plaintiff's exhibits and testimony of the coroner (Plaintiff's Exhibits 1-13, App. 8 and 10).

(2) That as a result of the defect in the track and roadbed, decedent's shoe was caught and wedged underneath a burned out tie and tie plate (App. 10 and 13).

(3) That there was evidence that the officers of respondent were negligent in failing to instruct their operating trainmen to slow down, blow a whistle, shine bright lights, ring a bell, keep a lookout, or give any signal as they passed the camp where decedent lived (App. 17).

(4) That there was evidence that the train travelling about 50 miles per hour failed to slow down or stop after seeing the employee on the track (App. 18, 24), and when the evidence showed that the view was unobstructed for two miles (App. 21 and Plaintiff's Exhibits 11 and 13).

(5) That there was evidence that all operating personnel knew of the camp as being established at the point where the employee was killed and no employee saw decedent just prior to being struck by the Respondent's train (App. 16 and 19).

(6) That there was evidence that the employee was normal, in good health and sober when last seen walking towards the tracks (App. 20).

(7) That there was evidence that a man had been found run over or struck or hit by a train of Respondent (App. 9 and 13) which man was Petitioner's Decedent.

(8) That there was evidence that there were no lights of any kind in the camp area and right of way (App. 11), which camp had been established for four years (App. 14).

(9) And that there was evidence that the engineer at the time of the fatal accident, which occurred on the south side of the right of way, was in fact looking at a man walking 300 feet away on a road north of the right of way (App. 24).

Excerpts from several of the cases construing the Federal Employers' Liability Act cited above demonstrate the direct role and function of the jury.

The applicable rule of law is authoritatively stated by Mr. Justice Murphy in *Lavender* v. *Kurn* (1946), 327 U. S. 645, l. c. 653, 66 S. Ct. 740, 90 L. Ed. 916, l. c. 923:

> "Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when

that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

This Court expounded the same principles in *Wilkerson* v. *McCarthy et al.* (1949), 336 U. S. 53, l. c. 55 and 57; 69 S. Ct. 413, 93 L. Ed. 497, l. c. 501, wherein Mr. Justice Black said:

"This Court has previously held in many cases that where jury trials are required, courts must submit the issues of negligence to a jury if evidence might justify a finding either way on those issues. * * * It was because of the importance of preserving for litigants in FELA cases their right to a jury trial that we granted certiorari in this case."

The opinion continued (l. c. 502):

"It is the established rule that in passing upon whether there is sufficient evidence to submit an issue to the jury we need look only to the evidence and reasonable inferences which tend to support the case of a litigant against whom a peremptory instruction has been given."

In *Blair* v. *Baltimore & O. R. Co.*, 323 U. S. 600, 65 S. Ct. 545, 89 L. Ed. 490 (1945), a reversal of a verdict for plaintiff in a FELA case was reversed by this court. Mr. Justice Black stated at page 604:

"We think there was sufficient evidence to submit to the jury the question of negligence posed by the complaint. The duty of the employer 'becomes more imperative as the risk increases.' * * * The negligence of the employer may be determined by viewing its conduct as a whole. * * * And especially is this true in a case such as this, where the several elements from which negligence might be inferred are so closely interwoven as to form a single pattern, and where each imparts character to the others."

A recent case where the evidence was not nearly as strong as in the instant matter, brings to mind the case of *Schulz* v. *Penn. R. R. Co.*, 350 U. S. 523. In that case the Plaintiff alleged her husband, while employed by the Defendant railroad as a tug fireman, was drowned because of Defendant's negligent failure to provide him with a safe place to work. The Trial Court directed the jury to return a verdict for the Defendant on the ground that the causal connection between negligence and death was not shown. The Court of Appeals affirmed the lower Court and the Supreme Court, in this decision, reversed. The facts showed that the deceased was assigned to work on four tug boats docked side by side. Three were unlighted, one only partly. There was some ice on the tugs. Deceased had to check all the tugs due to shortage of help. After checking, he returned to change into his working clothes and was last seen alive walking in the direction of the nearest tug. His street clothes were found in the engine room. Several weeks later Schulz's body was found in the water, clothed in nothing but shorts and socks with a flashlight in his hand. He had drowned. The Court said at page 525:

> "In considering the scope of the issues entrusted to juries in cases like this, it must be borne in mind that negligence cannot be established by direct, precise evidence such as can be used to show that a piece of ground is or is not an acre. But measuring negligence is different. The definitions of negligence are not definitions at all, strictly speaking. Usually one discussing the subject will say that negligence consists of doing that which a person of reasonable prudence would not have done, or of failing to do that which a person of reasonable prudence would have done under like circumstances. Issues of negligence therefore, call for the exercise of common sense and sound judgment under the circumstances of particular case. We think these are questions for the jury to determine. We see no reason, so long as the jury system is the law of the

land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others. *Jones* v. *East Tenn. V. & G. R. Co.*, * * * For 'The essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable.' Fact finding does not require mathematical certainty. Jurors are supposed to reach their conclusions on the basis of common sense, common understanding and fair beliefs, grounded on evidence consisting of direct statements by witness or proof of circumstances from which inferences can fairly be drawn.

We think the evidence was sufficient to require submission of the case to the jury and that it was error not to do so."

In *Rogers* v. *Missouri P. R. Co.*, 1 L. Ed. 2d 493, 515, Mr. Justice Brennan said at page 501:

"The decisions of this Court after the 1939 amendments teach that the Congress vested the power of decision in these actions exclusively in the jury in all but the infrequent cases where fair-minded jurors cannot honestly differ whether fault of the employer played any part in the employee's injury. Special and important reasons for the grant of certiorari in these cases are certainly present when lower federal and state courts persistently deprive litigants of their right to a jury determination."

This court said in *Bailey* v. *Central Vermont Ry. Co.*, 319 U. S. 350 (1942) at page 354:

"To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them."

In a case decided by the 7th Circuit Court of Appeals in *Griswold* v. *Gardner*, 155 F. 2d 333 at p. 334, the Court said:

"The case of *Lavender* v. *Kurn*, *supra*, the latest

decision of the Supreme Court under the Federal Employers' Liability Act leaves little room for doubt but that a directed verdict by a Trial Court or a holding by any court sustaining a directed verdict will not meet with favor, even though the verdict involves speculation and conjecture. In the *Lavender* case, the Missouri Supreme Court, 189 S. W. 2d 253 at 259, held: '* * * That it would be mere speculation and conjecture to say that Haney was struck by the mail hook and we are constrained to rule that plaintiff failed to make a submissible case on that question.' In response to this holding, the Supreme Court states (66 Supreme Court 744): 'It is no answer to say that the jury's verdict involves speculation and conjecture.' A reading of the facts of that case, both as related by the Supreme Court and the Supreme Court of Missouri, reveals very clearly that the jury's verdict as to the cause of decedent's death, especially as it applies to the Illinois Central RR., amounted to nothing more than a guess on its part.

That the Supreme Court treats the question of negligence and proximate cause as a jury question in this class of cases, is clearly shown by a study of these cases. Moreover, not only are these issues to be decided by the jury, but its decision is unassailable. In fact, it is difficult to conceive of a case brought under this Act where a Trial Court would be justified in directing a verdict."

A directive issued to all Trial Courts below by the Supreme Court of the United States in the case of *Tennant v. Peoria & Pekin R. R. Co.*, 321 U. S. 29 at p. 35 (88 L. Ed. 525) appears in the opinion of Mr. Justice Murphy:

"It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof give equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence

and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. *Washington & G. R. Co.* v. *McDade*, 135 U. S. 554, 571, 572, 34 L. ed. 235, 241, 242, 10 S. Ct. 1044; *Tiller* v. *Atlantic Coast Line R. Co.*, *supra* (318 U. S. 68, 87 L. Ed. 618, 63 S. Ct. 444, 143 ALR 967); *Bailey* v. *Central Vermont R. Co.*, 319 U. S. 350, 353, 354, 87 L. ed. 1444, 1447, 63 S. Ct. 1062. That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored.

Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

From the above cited decisions of this court and from the Petitioner's evidence, it is clear that the district court should not have weighed this evidence against the Petitioner but should have submitted the case to the jury. It was for the jury to consider all of the facts and circumstantial evidence with all reasonable inferences to be drawn therefrom. Taking these circumstances and conditions as known and existing at the time, the jury could have reasonably inferred as to how Petitioner's Decedent met his death and also (1) whether the defect in the roadbed was the cause or a contributing cause of his death, (2) whether the failure of the engineer to keep a proper lookout was the cause or a contributing cause of his death, (3) whether the Respondent's officers were negligent in the failure to instruct the operating trainmen and whether such failure to instruct was the cause or a contributing cause of the employee's death. Any of these factors, whether in combination or singly, may be found to be a negligent act or omission on the part of the carrier to which such fatal injury was due in whole or in part (*Eglsaer* v. *Scandrett*, 151 F. 2d 562).

II.

The District Court and the Court of Appeals Have Decided an Important Question of Federal Law on the Scope of Employment Which Has Not Been, But Should Be, Settled by This Court. Furthermore, the Decision Herein Is Not in Accord With Applicable Decisions of Other Courts of Appeals on the Question of Scope of Employment in an FELA Case.

The Court of Appeals for the Seventh Circuit in its decision affirming the judgment below, differed from a case involving similar facts decided in 1955 by the Court of Appeals for the Third Circuit. The facts as first reported in *Cassò* v. *Pennsylvania R. R. Co.*, 128 F. Supp. 909, are strikingly similar to the instant case where the trial judge discusses a track worker who was within the scope of his employment. The facts were that the plaintiff, track worker, had been paid on June 24th which was two days before the accident. He did not work the day following pay day but went from the place on a siding where he and his fellow workers were housed and fed into the town of Beaver Falls, Pa. In the early morning of June 26th he came back from Beaver Falls, walked along the track of the railroad and was struck by a passing train near the camp in which he was housed. At page 911, the trial judge said:

> "Under the evidence presented, it is my opinion that fair minded men cannot differ as to whether plaintiff was in the course of his employment at the time of his injury. The Federal Employers Liability Act requires liberal interpretation to accomplish the purposes intended. The facts as they relate to whether plaintiff was in the scope of his employment are clear and undisputed. Viewing the evidence in the light most favorable to the defendant, it shows: plaintiff and the other track employees were subject to twenty-four hour call to duty. They received their lodging in the cars free

of charge, but paid board covering their meals to a concern who had contracted for such services with defendant. The day before the accident, plaintiff had a day off. The evening before he had been in town with other employees on their own affairs. There was no access to the camp car area by public highway or sidewalk, as the camp cars were situated on property of defendant. Plaintiff and other employees walked to and from the bunk car area when on their own affairs, sometimes between the rails of the track on which the switching train was operated or on a path between the two sidings, and at other times on the unimproved roadway which entered the area from the east. Plaintiff had left his companions in town for the stated purpose of returning to his bunk car to retire for the night. He walked towards the line of bunk cars from the 10th Street Bridge. He had passed at least one and perhaps two of the cars when he was struck by the caboose of the train. At least two trainmen were standing on the caboose platform but neither saw plaintiff until the moment he was struck. The train was moving from three to four miles per hour when it struck plaintiff and it came to a stop at the third to fourth car at the west end of the camp car line. Plaintiff was struck when within twenty-five to thirty feet from the bunk car in which he slept. Under the foregoing facts, I held, as a matter of law that the plaintiff was within the scope of his employment when injured.

Defendant says that it was a question for the jury as to whether plaintiff was in the scope of his employment when he received his injuries; especially does defendant contend that it was for the jury as to whether plaintiff returned from town for the purpose of going to work the next day. In this connection, it should be kept in mind that the fact that plaintiff was struck while within the line of the camp cars, the fact that plaintiff's place of residence was in the bunk car provided by defendant, and the fact that plaintiff was on twenty-four hour duty, all were undisputed. It is true that plaintiff testified that he was returning to go to

sleep to ready himself for his next day's work. However, I do not regard the matter of plaintiff's intention as being an issue for the jury. *I regard plaintiff as being within the scope of his employment as he was subject to being called for work at any moment.* (Our Emphasis.) Also, it is not necessary that plaintiff should actually reach the steps of the car in which he lived to hold that he had returned to the place of his abode. It is true that the camp car area cannot be exactly defined, yet plaintiff had arrived back at the accommodations provided by the defendant, when injured. See *Mostyn* v. *Delaware L. & W. R. Co.*, 160 F. 2nd 15; *Chicago, M. St. P. & P. R. R. Co.* v. *Kane*, 33 F. 2nd 866, Ninth Circuit."

And at page 913, the trial judge continued, talking about the camp car area, as follows:

"Defendant claims error in permitting plaintiff's witnesses to testify that it was usual for men residing in the camp cars to use the railroad siding and the track where the accident occurred as longitudinal walkways during their off duty hours. This evidence was relevant on the question of defendant's negligence and plaintiff's contributory negligence. The custom and habit of the men walking in and about the camp car area certainly went to the question as to whether defendant had notice that plaintiff and others might be using the railroad sidings as walkways. In this connection, the evidence was that the siding in question was but little used and at irregular times. *Defendant had issued no instructions as to pathways which the men were to use.*" (Our emphasis.)

This decision was affirmed in 219 F. 2nd 303 on the question of scope of employment wherein Judge Goodrich said:

"It was undisputed that the track workers were subject to call at any time of day or night * * * The trial judge told the jury that the plaintiff was entitled to protection of the Act at the time he was hurt. The

defendant says no, he was not back in his employment until he reached the bunk car where he lived.

"We do not think that the ascertainment of when a man is under the protection of the Act is to be determined by any such mechanical rule as defendant contends. This is no baseball game in which the runner must touch base in order to be safe."

In the Second Circuit, *Mostyn* v. *Delaware, L. & W. R. Co.*, 160 F. 2nd 15, is a case where a laborer living in a bunk car furnished by his employer, did not work on Friday but instead went into town and came back to the bunk car. During the night, he picked up his mattress from the bunk car and went to sleep outside in the open air, along the right of way. Early Saturday morning, a train ran over his leg while he was asleep near the right of way. Judge Learned Hand, in talking about whether the employee was "employed" within the meaning of the Federal Employers Liability Act said "*It seems to us that when a railroad provides shelter or food or both for its employees, and they are using the accommodations so provided to prepare themselves for their work, or to rest or recuperate, they must be regarded as in its 'employ'.* Unless that is true we are driven back to including only the very work itself with the addition of going to or away from it. While the amendment does not help textually towards a solution it does impressly disclose an overall purpose to extend the scope of the statute." (Our emphasis.)

In the state court case of *Atlantic Coast Line R. R. Co.* v. *Meeks*, 208 S. W. 2nd 355, where this Court denied certiorari in 333 U. S. 827, the question of scope of employment was raised in which the state court said:

"* * * It is shown without contradiction that the place of abode was furnished by the railroad, on their premises, so that they might have the services of these laborers; that it was within the contemplation and undoubtedly of the employer and employee that the em

ployee use this place of abode even though no work was to be done the day following; that these employees were subject to call for work of the employer during the night when they were not in actual service; that it was necessarily incident to the employment to furnish this place because these laborers were recruited from various states and to keep them on the job, a place of abode was provided. It is clearly inferable that on the night of the accident herein; *i. e., if the accident had not happened, the plaintiff could have been called to work by the employer if necessity demanded.* * * * (Emphasis added.) It seems apparent that there was material evidence presented to the jury wherein they could find that the relation of employer and employee or master and servant existed between the parties at the time of the injury."

The United States Supreme Court, in an analogous situation, under the workmen's compensation case of *Bountiful Brick Co. v. Giles*, 276 U. S. 154, considered the question of the scope of employment. In that case an employee was struck by a train and killed on tracks immediately adjacent to the premises where he was employed. The Court said, in holding that the employment relation existed, at page 158:

"And employment includes not only the actual doing of the work but a reasonable margin of time and space necessary to be used in passing to and from the place where the work is to be done. If the employee be injured while passing, with the express or implied consent of the employer, to or from his work by a way over the employer's premises, or over those of another in such proximity and relation as to be in practical effect a part of the employer's premises, the injury is one arising out of and in the course of the employment as much as though it had happened while the employee was engaged in his work at the place of its performance. In other words, the employment may begin in point of time before the work is entered upon and in point of space before the place where the

> work is to be done is reached. Probably, as a general rule, employment may be said to begin when the employee reached the entrance to the employer's premises where the work is to be done; but it is clear that in some cases the rule extends to include adjacent premises used by the employee as a means of ingress and egress with the express or implied consent of the employer." (Cases cited.)

It is our contention that Petitioner's decedent, Floyd Brown, was within the scope of his employment as he was subject to being called for work at any moment. The defendant railroad had issued no instructions as to pathways which the men were to use. These section laborers were not confined to the camp when they were not on their regular duties. They were within their rights to come and go for there were no restrictions placed upon them. It is apparent that when a railroad provides shelter or food or both for its employees, and they use the accommodations so provided to prepare themselves for their work or be subject to call, or to rest or recuperate, they must be regarded as in the railroad's employ. It is also apparent that if the accident had not happened, Floyd Brown could have been called to work by the employer if necessity demanded. Therefore, it would appear from the facts shown and the cases cited that Floyd Brown was within the scope of his "employment" and within the protection of the F. E. L. A. at the time he was killed on the right of way of the Defendant railroad company.

The question of scope of employment in an F. E. L. A. case has not been settled by this Court and it is apparent that this decision is not in accord with decisions of this Court. This decision is in conflict with the decisions of the Court of Appeals in the Second, Third, and Ninth Circuits and the conflict thus created should be settled by this Court.

III.

The Trial Court and Court of Appeals, by Their Decisions, Erroneously Usurped the Function of the Jury Contrary to the Seventh Amendment of the Constitution of the United States.

The trial court and court of appeals indulged in unwarranted inferences when it stated, "Decedent here had no need to go upon the tracks for the Defendant had provided a cinder walkway along the north side of the right of way." (Opinion, App. A., v.) This was strictly speculation indulged in by the court for there is no evidence in the record that the Defendant had provided *any* walkway. The evidence is that there is a cinder walkway along the north side of the right of way and another walkway used by the railroad men on the south side of the right of way next to the east-bound main line (App. 13). Nor was there any walkover or crossover connecting the two walkways used.

Further, the court of appeals said, "This walkway provided *ample* access to and from the camp * * *" The court is here making an extra-judicial determination, from no evidence in the record, that one pathway was preferred over the other.

The court of appeals stated that "* * * Decedent, having chose instead to walk upon the tracks, his position becomes more that of a licensee than one pursuing his employment."

It would seem from the above statement of the court of appeals that the court is absolving the Defendant of any liability and going further than that is setting up an affirmative defense of contributory negligence in inferring that the Decedent of his own choice was walking on the tracks and concluding therefrom that Decedent was a licensee rather than an employee. Under the Federal Employer's Liability Act, the defense of contributory negli-

gence applies only to the mitigation of damages and does not defeat the action but becomes a question to be considered by the jury.

It is obvious that if the employee was using the walkway on the south side of the right of way used by the railroad men, he would, of necessity, have to cross the tracks in order to reach the camp since no walkover or crossover was provided. Furthermore, there were no warning signs pertaining to the crossing of tracks (App. 15).

The court of appeals weighs more evidence against the Petitioner when it says that

> "* * * what little evidence there is would seem to indicate that this particular train (referring to the 11:42 A. M. train) was the only passing train that could not have killed the Decedent." (Opinion, App. A., vi and vii.)

But the evidence is that the engineers of the trains just prior to the 11:42, namely, the 7:52 and 9:06, unequivocally stated that there was no evidence of any person or body on the track, nor was there any evidence of any accident. Certainly a jury could infer, under this evidence, by the process of elimination that the 11:42 A. M. train was the first train which struck and killed the employee. Under similar circumstances recovery was allowed a drunken trespasser. In the case of *Klepal, Adm.* v. *Penn. R. R. Co.*, 129 F. S. 688 (1955), affirmed in 229 F. 2d 610, a trespasser was struck while lying drunk on the track. The engineer testified as to what he saw, although denying that it was his train that was responsible. The judge indicated that these exculpatory statements must be viewed in the light of a strong motivation to absolve himself of responsibility for death. The judge further indicated that the inference was fully warranted that the engineer's train struck and killed the decedent.

The jury could infer that the employee who had no money (App. 12) or other means of sustenance was at 11:42 A. M. logically coming back to the only place where he was furnished his meals, *i. e.*, the camp. Certainly it is reasonable to infer that a man who was last seen by the camp cook at 4:30 A. M. would have hunger pains around 11:42 A. M.

The court of appeals indulges in further specious reasoning when it says, "While we may assume Brown's body was run over by Defendant's train or trains, there is no showing that Brown was alive at the time." The court of appeals ignored the evidence that when last seen alive by the camp cook, Baker, at 4:30 A. M., Floyd Brown appeared normal, sober and in good health. The court of appeals overlooks the presumption that life continues.

In 25 C. J. S. Section 5, page 1053, the authors state:

> "'Presumption of continuance of life.' One who is shown to be alive at a given time is presumed to remain alive until the contrary is shown by proof or, in the absence of proof, until a different presumption arises.
>
> "Where a person is shown to have been alive at a certain time, it will be presumed or inferred that he was alive at a subsequent time. Citing *American Sugar Refining Co.* v. *Ned, et al.*, 209 F. 2nd 636. In re: *Chicago* v. *N. W. Ry. Co.*, 138 F. 2nd 753, cert. denied 321 U. S. 789."

To this evidence must be added the presumption that Floyd Brown was in the exercise of due care for his own safety at the time he was killed. *Stanford* v. *Penn. R. R. Co.* (7th Circuit), 171 F. (2) 632 at 635. *Tennant* v. *Peoria & Pekin Union R. Co.*, 321 U. S. 29 at 34.

As was said in *U. S.* v. *Fotopulas*, 180 F. (2) 631 (9th Circuit) at page 637:

> "The presumption that a person looks out for his

> own safety comes to the aid of the Plaintiff. Sec. 31, C. J. S., Evidence, page 135. This presumption thus rises to the dignity of evidence when, either because of the injuries suffered or because of death, the Plaintiff cannot testify. *Westberg* v. *Willde*, 1939, 14 Col. 2d 360, 364-365, 94 P. (2) 590; *Douglas* v. *Hoff*, 1947, 82 Col. App. 2d 82, 85, 185 P. (2) 607. It creates a conflict with any evidence to the contrary. *McKingley* v. *So. Pac. Co.*, 1947, 80 Col. App. (2) 301, 313-314, 181 P. (2) 899. And it is sufficient to support the verdict of a jury or the finding of a court unless overcome by irrefutable evidence."

In addition to such presumption, we have the evidence of the engineers of trains at 7:52 A. M. and 9:06 A. M. to substantiate this presumption that Brown was still alive at those times.

The court of appeals would infer from the evidence that Brown was killed at 4:30 A. M., but fail to reconcile the evidence that no one was on the tracks until the 11:42 A. M. train went past the camp. Assuming arguendo that Floyd Brown was first struck at 4:30 A. M., the question of lack of lights in the area would certainly be a question of fact as to whether such failure of lights was a cause or contributing cause of his death.

The Coroner also indicated in discussing the alleged time of death, that the Decedent could have been killed at five or seven or nine, or could have varied. He also testified it was difficult to state a definite time of death (App. 12).

The court of appeals minimizes the positive evidence of the defective track and roadbed by asserting that there is no proof that the shoe wedged underneath the burned out tie and tie plate belonged to the employee, Brown. In direct examination of the Coroner, all the questions asked were referring to this individual (Floyd Brown) *i. e.*, his

shoes, personal belongings, clothing and parts of his body. The Coroner testified he picked up the individual's shoes at the scene and also picked up all the pieces (App. 9, 12 and 13).

Although the defendant denied in its answer that the employee was given orders or instructions just prior to his death; the evidence showed that the extra gang foreman, C. L. Calvert, of Tyner, Indiana, gave instructions or orders to the decedent, Floyd Brown, prior to his death (App. 15 and 16).

In the case of *Lukon* v. *Penn. R. Co.* (3rd Circuit), 131 F. (2) 327, where a section hand was killed while walking on the tracks from work on the main line toward a toolhouse, which was also in direction of his home. This was the custom of the crew, although at the time the section hand had no tools to deliver to the toolhouse. The court said at page 329:

> "A more difficult question is whether or not the jury was entitled upon the evidence to draw the inference that Lukon was killed because of the defendants' asserted negligence. Although there was no witness who actually saw Lukon struck, there was ample circumstantial evidence to indicate how he was injured. Such evidence has probative value equal to that of testimonial evidence. Wigmore on Evidence, Third Ed., Sec. 36."

The trial judge erred in not submitting the case to the jury for its determination. It therefore appears that the Court of Appeals erred in failing to reverse the judgment below so as to restore to the jury the historic role of passing on disputed questions of fact and inferences therefrom, in conflict with the above cited decisions. Unless the Writ of Certiorari is granted and this error corrected, it will result in prejudice to the substantial rights

of this plaintiff and of other persons whose cases might be decided in a similar fashion contrary to the decisions of this Court.

CONCLUSION.

For the above reasons a Writ of Certiorari should be granted as prayed for.

Respectfully submitted,

JUSTIN WAITKUS,
ANTHONY J. CEFALI,
Counsel for Petitioner.

APPENDIX A.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

No. 12257 SEPTEMBER TERM, 1957, APRIL SESSION, 1958.

EMILY BAUM, Administratrix of the the Estate of FLOYD BROWN, Deceased,
Plaintiff-Appellant,
v.
THE BALTIMORE & OHIO RAILROAD COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

June 27, 1958.

Before DUFFY, *Chief Judge*, FINNEGAN and PARKINSON, *Circuit Judges.*

PARKINSON, *Circuit Judge.* This action under the Federal Employers' Liability Act originated by complaint in the District Court charging the defendant with failure to provide Floyd Brown, the plaintiff's decedent, with a safe place to work and to operate its trains in a careful and prudent manner on Saturday, September 12, 1953.

At the conclusion of the plaintiff's case the District Court, on written motion of the defendant, directed a verdict in its favor. Judgment was entered on the verdict and this appeal followed.

The facts for the most part are undisputed. The decedent had been hired by the defendant as a section gang laborer on September 1, 1953. At the time of his death he and some forty other section gang laborers were living in bunkhouses provided by the railroad. These bunkhouses, comprising "the camp", were situated alongside the defendant's main right-of-way in Porter County, Indiana. This right-of-way consisted of three sets of tracks: a west-bound track, an east-bound track and a switching or passing siding.

The camp was to the north of the right-of-way, nearest the passing siding. There was a cinder roadway running along the north side of the right-of-way leading to public crossovers some distance away to the east and west. There was no crossover from one side of the right-of-way to the other in the near vicinity of the camp.

Ordinarily these laborers, including plaintiff's decedent, worked only eight hours a day Monday through Friday. They did not work on Saturdays, Sundays or holidays. If there was an emergency on the right-of-way on a Saturday, Sunday or holiday any of the laborers who were in camp and available were subject to call but they were not required to remain in camp nor to be on call Saturdays or Sundays and they did not have to check out nor get permission from anyone to leave the camp.

About 4:30 A. M. on Saturday morning, September 12, 1953, the decedent asked the camp cook "for some meat scraps to go fishing." The cook gave him the meat scraps and he left. He seemed to be sober and in good health. He was then last seen alive walking south toward the tracks.

Decedent's body was discovered, lying mutilated, along the east-bound main track, by the engineer of Train No. 92 at approximately 11:42 A. M. that same day. The engineer, one Harry Marr, an employee of defendant for the

past 37 years, said that when he was 300 feet east of the labor camp he first saw an undiscernible object that looked something like a collection of newspapers bundled up along the track. It also looked like "rags or sacks" and was approximately 200 feet ahead when he first saw it. When the engine reached the object the engineer could tell "that apparently a colored person had been run over". (Decedent was a negro.) The engineer further stated that his train "was not involved in any accident at any time."

The body was identified as that of decedent Floyd Brown. Defendant stipulated that if decedent were alive at the time he was run over by a train "it would indicate that that would be the cause of his death."

Plaintiff fixed the time of decedent's death at approximately 5:00 A. M. by her witness Coroner Johnson. Counsel for plaintiff asked him the following question on direct examination and he gave the answer below:

> "Q. Mr. Johnson, from the body, as you found it, did you estimate the time of death of Floyd Brown?
>
> A. Yes, sir, I believe I did estimate from the time of the year, weather conditions, the dryness of blood at certain places. I estimated that he died at approximately five A. M., five o'clock in the morning."

Counsel for plaintiff interrogated him further and with some questions by the court if developed that the time of death could have varied somewhat. William Litchfield in his written statement introduced in evidence by the plaintiff fixed the time of death at six to eight hours before he arrived at the scene right after noon time.

Betwen the time decedent was last seen alive and the time his body was discovered seven trains passed the camp site. Two of these trains were east bound. Upon learning of the accident the railroad had its personnel

inspect the engines of both these trains for any evidence that either had been involved in an accident. No such evidence was found.

Defendant's motion for a directed verdict was on the following grounds:

"1. There is no evidence as to how, when, or where the decedent, Floyd Brown, came to his death.

2. There is no evidence that at the time of his death Floyd Brown was performing any act connected with his employment by the defendant in interstate commerce or otherwise.

3. There is no evidence that the death of Floyd Brown was caused by any act of negligence of the defendant, or by the operation of any engine or train of the defendant."

The court granted the motion for the reasons stated therein and held that the evidence established that plaintiff's decedent when on defendant's track was not working or doing anything even remotely connected with his employment; that he was there for his own purposes and pleasure; that there was no evidence as to how plaintiff's decedent met his death and no evidence of any negligence whatsoever on the part of the defendant which could have been the cause of his death, proximate or otherwise.

As Mr. Justice Brennan, delivering the opinion for the court, reported as *Rogers* v. *Missouri Pacific Railroad Co.*, 1957, 352 U. S. 500, 506-507, said:

> "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine

whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities. The statute expressly imposes liability upon the employer to pay damages for injury or death due 'in whole or *in part*' to its negligence."

Decedent died on a Saturday which, for him, was not a work day. While it is true he was subject to call *if* an emergency arose and *if* he was available such was not the case here. Decedent was last seen alive embarking upon a fishing trip which had no connection with his employment by the defendant. While it is true the Act has not been limited in its application to actual labor it has not, that we are aware of, been extended to the point it will cover decedent in the present case. Decedent here had no need to go upon the railroad tracks for the defendant had provided a cinder walk way along the north side of the right-of-way. This walk way provided ample access to and from the camp and decedent having chosen instead to walk upon the tracks his position becomes more that of a licensee than one pursuing his employment.

Plaintiff cites several cases to substantiate his point that decedent was within the scope of his employment. *Bonifiul Brick Co.* v. *Giles*, 276 U. S. 154; *Casso* v. *Pennsylvania Railroad Company*, 219 F. 2d 303; *Mostyn* v. *Delaware, L and W. R. Co.*, 160 F. 2d 15; *Virginian Ry. Co.* v. *Early*, 130 F. 2d 548; *Chicago, M., St. P. & P. R. R. Co.* v. *Kane*, 33 F. 2d 866; *Atlantic Coast Line R. R. Co.* v. *Meeks*, 208 S. W. 2d 355. A careful reading of these cases reveals that the employees were there either passing to or from where the work was to be done, crossing the tracks

because their only exit was on the other side and they had to do so, or were doing something *necessarily incident* to their employment. They were certainly not going fishing on their day off and crossing the tracks when there was absolutely no necessity for so doing.

Of perhaps more importance is the fact that there is absolutely no evidence as to how Floyd Brown met his death. While we may assume Brown's body was run over by defendant's train or trains there is no showing that Brown was alive at the time. Plaintiff in her brief first suggests that the jury could infer decedent might have attempted to cross the tracks at 4:30 A. M. and "*was hit by a passing train*". At a later point when speaking of the engineer of the 9:06 A. M. Train plaintiff states "[p]*erhaps it was his train who struck Brown*" and yet later still we have the argument, as to the 11:42 A. M. Train, that it "*is evident the jury could readily infer that train No. 92 was the 'death train' or the 'hit and run' train.*"

A shoe was found underneath a tie plate and from this fact plaintiff again suggests a number of theories upon which to predicate negligence. Not only are these theories remote and speculative but they ignore the fact that there is no proof that the shoe was Brown's and moreover, Engineer Marr of Train No. 92 stated that as he passed the scene of the accident he saw a *pair* of shoes lying outside the east bound track.

Without further proof, and there is none, the jury is left to speculate as to just how Brown died. In oral argument before this court counsel for plaintiff, when pressed, stated it was his theory that Train No. 92 passing the camp at approximately 11:42 A. M. had struck and killed Brown. This was the train that he characterizes as the "death train." However, what little evidence

there is would seem to indicate that this particular train was the only passing train that could not have killed decedent. The engineer states that after seeing rag or sack like bundles along the tracks he saw that a man had been run over and he further states that his train was not in any accident whatsoever. He distinctly speaks of the accident as having occurred before he reached the scene. Furthermore the time of death would seem to be well prior to the time this train passed.

Plaintiff contends that defendant was negligent in that it failed to keep a proper lookout for decedent, that it failed to give proper warning signals, and that it failed to keep the engines properly lighted at all times knowing "full well the position of the decedent and the work in which he was engaged and the place that he might be expected to be."

Here again there is a complete failure of proof. Plaintiff would have us submit the case to the jury on the theory that they, the jury, might infer the above allegations to be true. A search of the record discloses not one iota of evidence from which the jury could find or reasonably infer any failure to keep a proper lookout, sound warning signals or keep the engines properly lighted. In addition the proof shows that decedent was not engaged in any work when he died and unless the engineers of the passing trains were clairvoyant they would hardly know "full well" that decedent or anybody else would "be expected to be" on the main line of the railroad going fishing or for any legitimate reason at 4:30 in the morning.

Plaintiff here wished to present to the jury the fact that decedent's body was found on defendant's main line in a mutilated condition and then hoped that through speculation, guesswork and inference the jury would find that the defendant through its negligence somehow ran

down and killed decedent. What plaintiff refers to as "positive evidence" amounts to nothing more than pure fantasy and contains even less substance than broth brewed from the bones of a starved pigeon. In short there is no proof, either evidentiary or from which any reasonable inferences could be drawn, of any negligence of the defendant whatsoever which could have played a part, even in the slightest, in producing the death of Floyd Brown.

A jury may not be permitted to guess liability upon a record that is as completely devoid of all proof as is this one before use. *Kansas City Southern Ry. Co.* v. *Jones*, 1928, 276 U. S. 303; *Moore* v. *Chesapeake & Ohio R. Co.*, 1951, 340 U. S. 573, 577; *Milom* v. *New York Central R. R. Co.*, 7 Cir., 1957, 248 F. 2d 52, cert. den. 355 U. S. 953.

Without a doubt the District Court correctly directed a verdict for the defendant in this case.

The judgment is AFFIRMED.

APPENDIX B.

Order Denying Rehearing.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

Tuesday, July 29, 1958.

Before

Hon. F. Ryan Duffy, Chief Judge.
Hon. Philip J. Finnegan, Circuit Judge.
Hon. W. Lynn Parkinson, Circuit Judge.

EMILY BAUM, Administratrix of the Estate of FLOYD BROWN, Deceased,
Plaintiff-Appellant,
vs.
THE BALTIMORE & OHIO RAILROAD COMPANY,
Defendant-Appellee.

No. 12257

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

It is ordered by the Court that the petition for rehearing of this cause be, and the same is hereby, DENIED.

APPENDIX C.

Courts of Appeals; Certiorari.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal cases, before or after rendition of judgment of decree. June 25, 1948, c. 646, 62 Stat. 928, 28 U. S. Code, Sec. 1254 (1).

Supreme Court; time for appeal or certiorari; docketing; stay. Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying a writ of certiorari for a period not exceeding sixty days. 28 U. S. Code 2101 (c).

APPENDIX D.

The Federal Employers' Liability Act.

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in personal representative, for the benefit of the surviving widow or husband and children of such employee; and if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, Sec. 1, 35 Stat. 65, Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404. 45 U. S. Code, Sec. 51.

APPENDIX E.

Contributory Negligence; Diminution of Damages.

In all actions hereafter brought against any such common carries by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. April 22, 1908, c. 149, Sec. 3, 35 Stat. 66; 45 U. S. Code, Sec. 53.

APPENDIX F.

Assumption of Risks of Employment.

In any action brought against any common carrier under or by virtue of, any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of him employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. April 22, 1908, c. 149, Sec. 4, 35 Stat. 66; Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404; 45 U. S. Code, Sec. 54.

APPENDIX G.

Actions; Limitations; Concurrent Jurisdiction of Courts

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States. Apr. 22, 1908, c. 149, Sec. 6, 35 Stat. 66; Apr. 5, 1910, c. 143, Sec. 1, 36 Stat. 291; Mar. 3, 1911, c. 231, Sec. 291, 36 Stat. 1167, Aug. 11, 1939, c. 685, Sec. 2, 53 Stat. 1404; June 25, 1948, c. 646, Sec. 18, 62 Stat. 989. 45 U. S. Code, Sec. 56.